NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY
A DIVISION OF THE POOL COMPANY,
Petitioner,

v.

MOBIL OIL CORPORATION, ET AL.,
Respondents.

On Petition For Writ of Certiorari To The Court of Civil Appeals For The Fourteenth Supreme Judicial District of Texas

SUPPLEMENTAL BRIEF OF RESPONDENT STEVEN GAEDECKE

JOSEPH D. JAMAIL
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000
Counsel of record for Steven Gaedecke

Of Counsel:

JAMAIL, KOLIUS & MITHOFF
GUS KOLIUS
JOHN B. NEIBEL
NAT B. KING
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
INTRODUCTION	1
I. POOL V. KEMPER INSURANCE GROUP CONSTRUES THE WRONG STATUTE	2
II. NORFOLK & WESTERN RAILWAY CO. V. LIEPELT, 100 S.Ct. 755 (1980)	5
A. Procedure	5
B. Which first—the chicken or the egg?	5
CONCLUSION	7
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

CASES

	Page
Bourg v. Texaco Oil Company, Inc., 578 F.2d 1117, 1120 (5th Cir. 1978)	6
Bradley v. School Board of City of Richmond, 416 U.S. 696, 711, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974)	4
Custom Leasing, Inc. v. Texas Bank & T. Co. of Dallas, 516 S.W.2d 138, 142 (Tex. 1974)	5
Fluor Ocean Services, Inc. v. Rucker Co., 341 F.Supp. 757 E.D. La. 1972)	3
Freidrich v. Whittaker Corp., 467 F.Supp. 1012 (S.D. Tex. 1979)	3
Gravois v. Travelers Indemnity Co., 173 So.2d 550 (La. App., writ ref'd 175 So.2d 301)	2, 3
Gulf Offshore Co. v. Mobil Oil Corp., 594 S.W.2d 497, decided December 12, 1979, motion for rehearing denied January 9, 1980	2
Olsen v. Shell Oil Co., 561 F.2d 1178 (5th Cir. 1977, cert. den. 444 U.S. 979)	6
Pool v. Kemper Insurance Group, 386 So.2d 1006 (La. App., May 21, 1980)	1, 2
Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 1194 (1950)	3

UNITED STATES STATUTES

43 U.S.C. § 1333(b)	3, 4
43 U.S.C. § 1349(b)(1)	4

NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY
A DIVISION OF THE POOL COMPANY,
Petitioner,

v.

MOBIL OIL CORPORATION, ET AL.,
Respondents.

On Petition For Writ of Certiorari To The Court of Civil Appeals For The Fourteenth Supreme Judicial District of Texas

SUPPLEMENTAL BRIEF OF RESPONDENT STEVEN GAEDECKE

INTRODUCTION

Too little—too late

Petitioner ("Gulf") has filed a Reply Brief in which it brings to the attention of the Court a "newly" [sic] reported decision of a "Louisiana appellate court finding in favor of the exclusivity of federal court jurisdiction in Outer Continental Shelf Lands Act cases." This is *Pool v.*

Kemper Insurance Group, 386 So.2d 1006 (La. App., May 21, 1980).

Gulf filed its petition for certiorari in this case on October 14, 1980, and while *Pool* does not bolster Gulf's jurisdictional contentions it does raise the question as to why it was not presented in the petition for certiorari.[1]

Thus, we believe it would be helpful to (1) succinctly point out the inapplicability of *Pool* to the case at bar, (2) briefly correct Gulf's misconception of its failure to follow Texas practice (which now touches on this Court's jurisdiction), and (3) set at rest Gulf's misconceived idea that the Lands Act (OCSLA) created respondent Gaedecke's remedy. The filing of this brief will not cause harm, prejudice or delay.

I.

POOL V. KEMPER INSURANCE GROUP CONSTRUES THE WRONG STATUTE

Pool blindly follows *Gravois v. Travelers Indemnity Co.*, 173 So.2d 550 (La. App., writ ref'd 175 So.2d 301) and appears to have been considered in the same "offhand manner"[2] as *Gravois* (173 So.2d 553) because the court

---

1. This Court's rules seem to contemplate that while a petition for certiorari is pending supplements thereto are intended to cover "new cases * * * not available at the party's last filing." S.Ct. R. 22.6.

2. As an indication of its perfunctoriness, we note that the *Pool* court said in its May 21, 1980 opinion that the only cases it found specifically dealing with whether state courts have concurrent jurisdiction with federal courts over actions arising out of incidents on fixed rigs located on the Outer Continental Shelf were *Gravois* and *Freidrich.* (386 So.2d 1011). It ignored the decision of the court of civil appeals in this case—*Gulf Offshore Co. v. Mobil Oil Corp.*, 594 S.W.2d 497, decided *December 12, 1979,* motion for rehearing denied *January 9, 1980.*

fell into the same constitutional error. It adopted *Gravois'* erroneous holding that had Congress intended to grant concurrent jurisdiction it would have said so in OCSLA, and its failure to do so shows "their intention to retain [sic] jurisdiction in the United States Courts" (386 So.2d at 1010). This is error as pointed out in our Brief in Opposition, p. 10.

But *Pool* went even further and gave a "*broad interpretation*" to the OCSLA jurisdictional grant. This, too, is error and counter to *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 1194 (1950), holding that congressional grants of jurisdiction are strictly construed.

Interestingly enough the *Pool* court finds *Fluor Ocean Services, Inc. v. Rucker Co.*, 341 F.Supp. 757 (E.D. La. 1972), relied on by Gulf (Pet. for Cert. pp. 13, 14), not to be in point on the jurisdictional question. Judge Sterling in *Freidrich v. Whittaker Corp.*, 467 F.Supp. 1012 (S.D. Tex. 1979), another case relied on by *Gulf* (Pet. for Cert. p. 14), had trepidation about *Fluor* (467 F. Supp. at 1015).

But most importantly, *Pool* was decided under the original 1953 Lands Act, 43 U.S.C. § 1333(b). 386 So.2d at 1010. So were all the other cases relied on by Gulf (Pet. for Cert. pp. 8, 9): *Gravois,* 173 So.2d at 553; *Fluor,* 341 F.Supp. at 759, 760; *Borne,* 1973 A.M.C. at 389; and *Friedrich,* 467 F.Supp. at 1013. The 1978 Amendments to the Lands Act were not in issue in any of these cases.

This answers petitioner's question:

> If Respondents' arguments are so unequivocably and undeniably correct, how, then, does one explain

> the fact that every court which has considered the issue except the court below has held against Respondents' position? (Reply Brief pp. 3, 4).

The answer is that all of the decisions of these courts rest on the original 1953 Lands Act, not the pertinent 1978 Amendments thereto, as did the court below in this case. 594 S.W.2d 497, 502. "Jurisdiction," "exclusive jurisdiction": actually that is the only jurisdictional contention of Petitioner in this case.

As stated in our Brief in Opposition (pp. 12, 13) the jurisdictional section of the original 1953 Lands Act, 43 U.S.C. § 1333(b), "original jurisdiction," had become controversial and the 1978 amendment, 43 U.S.C. § 1349 (b)(1), "jurisdiction," signaled clear changes in the law. This is borne out by the Congressional findings in Section 101(8) of the 1978 Amendments (92 Stat. 630):

> [T]here presently exists a variety of technological, economic, environmental, administrative and *legal problems* which tend to retard the development of the oil and gas natural reserves of the Outer Continental Shelf. (Emphasis ours).

The Texas Court of Civil Appeals and the Texas Supreme Court were required to apply the jurisdictional section of the 1978 Amendments, 43 U.S.C. § 1349 (b)(1); not 43 U.S.C. § 1333(b) contained in the original 1953 Lands Act (Brief in Opposition pp. 11-13). An appellate court reviews the law as it presently is, not as it once was. *Bradley v. School Board of City of Richmond,* 416 U.S. 696, 711, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974).

II.

NORFOLK & WESTERN RAILWAY CO. V. LIEPELT, 100 S.Ct. 755 (1980)

A. Procedure

Liepelt was decided February 19, 1980 after Gulf's application for a writ of error was under submission in the Texas Supreme Court, and was brought to that court's attention by Gulf. Gaedecke then raised the procedural point that Gulf, by failing to comply with Texas procedure in requesting an instruction on federal income taxes, had waived the point. That point is now asserted in this Court as a jurisdictional ground for denying the writ (Brief in Opposition, pp. 2-3).

Gulf's only serious contention is that as the court of civil appeals discussed the point in its opinion it was not waived (Reply brief p. 5). To this it suffices to say that in Texas, "It is the duty of the appellate court to sustain the judgment of the *trial court* if it is correct on any theory of law applicable to the case." (Emphasis ours). *Custom Leasing, Inc. v. Texas Bank & T. Co. of Dallas,* 516 S.W.2d 138, 142 (Tex. 1974). The Texas Supreme Court did this in denying Gulf's application for a writ of error.

B. Which first—the chicken or the egg?

Gulf says OCSLA applies federal law first and state law only absent federal law. It then assumes, with no proof whatever, that Louisiana law does not require a jury instruction on federal income taxes and it is necessary to have recourse to *Leipelt,* which is federal common

law. In this circumgyration it still insists that Gaedecke's cause of action is derived from the Lands Act, citing *Bourg v. Texaco Oil Company, Inc.*, 578 F.2d 1117, 1120 (5th Cir. 1978).

We read *Bourg* to the contrary, for it says that a plaintiff worker on the Shelf is allowed "any type of negligence * * * *which would be cognizable under state law*" (578 F.2d 1120, emphasis ours).

And no one can read the exhaustive and learned opinion of Judge Fay in *Olsen v. Shell Oil Co.*, 561 F.2d 1178 (5th Cir. 1977, cert. den. 444 U.S. 979) without being convinced that the Lands Act, federal law, required Gaedecke "to look to state law for redress" and that "this controversy should be controlled by state law." (561 F.2d at 1190). This because no civil remedy other than common law negligence may be implied in this case:

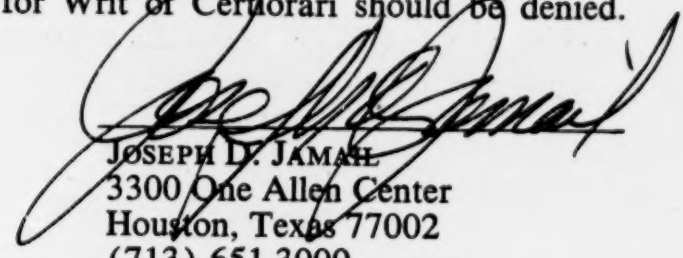
(1) "[A] cause of action should not be created unless the primary purpose of the Act (or at least one of the primary purposes) is to benefit or protect the workers on offshore oil platforms." (561 F.2d 1187). The legislative history of the Lands Act shows that if this was the case it was "at best secondary concern." (561 F.2d 1188).

(2) State law should govern this controversy, "not solely because there are 'gaps in the Federal Code,' " but because Congress recognized "that the individual states had a very real interest in the workers on these platforms." (561 F.2d 1189).

It is respectfully submitted that there is no basis for injecting the imponderables of federal common law in the Lands Act.

CONCLUSION

The Petition for Writ of Certiorari should be denied.



JOSEPH D. JAMAIL
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000

Counsel of record for
Steven Gaedecke

Of Counsel:

JAMAIL, KOLIUS & MITHOFF
GUS KOLIUS
JOHN B. NEIBEL
NAT B. KING
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000

CERTIFICATE OF SERVICE

I, Joseph D. Jamail, a member of the bar of this Court and counsel for Steven Gaedecke, hereby certify that:

(1) All parties required to be served in this proceeding have been served;

(2) Three copies of the foregoing Supplemental Brief of Respondent Steven Gaedecke were served on counsel for each of the other parties separately represented in this proceeding at their respective post office addresses, viz.,

Bradley A. Jackson, Esq.
Royston, Rayzor, Vickery & Williams
3710 One Shell Plaza
Houston, Texas 77002;

Frank Caton, Esq.
Crain, Caton, James & Womble
Two Houston Center
Houston, Texas 77002;

(3) Service on each of such parties was made on December 9, 1980, by depositing said copies of this Supplemental Brief in a United States Post Office, first class postage prepaid, and addressed to the above-named counsel.

JOSEPH D. JAMAIL